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No. 03-741

IN THE

Supreme Court of the United States

HWANG GEUM JOO, *et al.*,

Petitioners,

v.

GOVERNMENT OF JAPAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the D.C. Circuit correctly held that the commercial activity exception of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602 *et seq.*, does not apply retroactively to acts that occurred before 1952, where applying that exception retroactively would upset the settled expectations of foreign sovereigns that they would not be subject to suit in the United States for such acts.

2. Whether the D.C. Circuit correctly held—as has every other circuit court to consider the issue—that there is no *jus cogens* exception to sovereign immunity.

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BRIEF IN OPPOSITION

INTRODUCTION

The Treaty of Peace With Japan, signed Sept. 8, 1951, formally concluded World War II in the Pacific theater. That Treaty, entered into by Japan, the United States, and forty-four other Allied nations, expressly settled all war-related claims of the signatory nations and their nationals arising out of the actions of Japan and its nationals during World War II. *See* Treaty of Peace With Japan, Sept. 8, 1951, 136 U.N.T.S. 45 (the "San Francisco Treaty"). As the court of appeals below recognized, the Treaty "embodies the foreign policy determination of the United States that *all* claims against Japan arising out of its prosecution of World War II are to be resolved through intergovernmental settlements." Pet. App.

10a (emphasis added; quotation omitted). That policy has proved successful, as Japan has not only become a productive and peaceful member of the international community, but one of this Nation's most important and trusted allies.

More than fifty years after the fact, petitioners (a group of foreign nationals who reside abroad) brought suit in the United States against Japan (a foreign sovereign) for war reparations arising out of events that occurred in Asia during World War II.[1] As a basis for subject matter jurisdiction, plaintiffs invoked the "waiver" and "commercial activity" exceptions of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602 *et seq*. The District Court dismissed the complaint, and the D.C. Circuit affirmed. Applying this Court's now familiar retroactivity analysis, the D.C. Circuit held that the FSIA's commercial activity exception did not apply retroactively to claims against Japan arising out of wartime events that occurred before 1952, when the United States adhered to the "absolute" theory of sovereign immunity. Applying binding circuit precedent, the D.C. Circuit also held that Japan had not implicitly waived its immunity by violating *jus cogens* norms. Because petitioners had failed to establish that one of the FSIA's exceptions to immunity applied, "the courts of the United States simply [were] not authorized to hear their case." Pet. App. 16a.

Contrary to petitioners' assertions, the decision below does not conflict with any of this Court's decisions. Indeed, the D.C. Circuit faithfully applied this Court's retroactivity precedents. Nor does the decision below conflict with the decision of any other court. Petitioners allege a conflict with the Ninth Circuit's decision in *Altmann* v. *Republic of*

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[1] Although not relevant to the legal issues here, Japan has expressed publicly on numerous occasions its sincere apologies and remorse for the grave affronts to the honor and dignity of former "comfort women."

Austria, 317 F.3d 954 (9th Cir. 2002), *cert. granted*, 124 S. Ct. 46 (2003) (No. 03-13). As the D.C. Circuit expressly held, however, this case is distinguishable from *Altmann* in several key respects, including that there "was no similar treaty [to the San Francisco Treaty] with Germany or Austria." Pet. App. 11a. Indeed, in light of the D.C. Circuit's recognition that the Treaty embodies a specific policy that all claims relating to the wartime actions of Japan's former military are to be resolved through intergovernmental negotiations rather than litigation, this case was properly dismissed regardless of how this Court rules in *Altmann*. Because there is no genuine conflict with *Altmann* or any other case, and because numerous alternative grounds exist for affirmance in any event, there is no reason for the Court to grant certiorari or even hold this case pending its decision in *Altmann*. The petition should be denied.

STATEMENT OF THE CASE

At the end of World War II, the United States recognized that it would be impossible for Japan to make full reparation for the damage its former military had caused. Determined not to repeat the mistakes of the Treaty of Versailles—which contained onerous reparations provisions that were largely believed to have led directly to the rise of fascism in Europe—the United States adopted a policy of resolving all Japanese war-related claims through government-to-government negotiations, with the goal of reintegrating Japan into the community of democratic nations without imposing crushing financial liability. *See generally Mitsubishi Materials Corp.* v. *Superior Court*, 6 Cal. Rptr. 3d 159, 166-169 (Ct. App. 2003); *In re World War II Era Japanese Forced Labor Litig.*, 114 F. Supp. 2d 939, 946-947 (N.D. Cal. 2000), *aff'd on other grounds*, 324 F.3d 692 (9th Cir.), *cert. denied*, 124 S. Ct. 105 (2003).

The San Francisco Treaty was the culmination of that policy. Among other things, the Treaty expressly waived "all

* * * claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." *Id.* art. 14(b). In return, Japan agreed to numerous conditions and restrictions, including a reciprocal waiver and the right of the Allied Powers to seize Japanese assets within their respective jurisdictions. *Id.* art. 14(a). The Treaty further provided that Japan would resolve the war-related claims of other nations through bilateral treaties "on the same or substantially the same terms." *Id.* art. 26. These provisions (and others) accomplished the foreign policy goals of the drafters, as Japan has once again become an accepted member of the community of democratic nations.

Proceedings Below. More than a half a century after the end of World War II, petitioners filed this suit in the United States against Japan seeking war reparations arising out of events that occurred in Asia during the war. Petitioners invoked subject matter jurisdiction under the FSIA's "waiver" and "commercial activity" exceptions to sovereign immunity. *See* 28 U.S.C. §§ 1605(a)(1), (a)(2). Among other things, petitioners alleged that Japan had implicitly waived its immunity to suit in the United States by violating *jus cogens* norms—*i.e.*, "principle[s] of international law * * * accepted by the international community of States as a whole as a norm from which no derogation is permitted." *Princz* v. *Federal Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1121 (1995) (quotation omitted). Petitioners raised that argument even though the D.C. Circuit (like every other circuit court to have considered the argument) had expressly rejected it in *Princz*.

Although petitioners attempted to shoehorn their claims into the FSIA's commercial activity exception by characterizing Japan's alleged conduct as "commercial" in nature, their complaint tells a different story. There, petitioners allege "war crimes," "crimes against humanity," and "atrocities." Pet. App. 93a, 110a, 115a, 127a, 128a-129a. They

further allege that Japan engaged in a "premeditated master plan" to force women into "sexual slavery," which was "planned, ordered, established, and controlled by Japan for the benefit of its [military] and certain others." Pet. App. 92a, 112a. Petitioners assert that this was a "systematic and carefully planned system ordered and executed by the Japanese Government." Pet. App. 119a.

The war crimes are described as taking place in "military" camps, sometimes "[n]ear the front lines," that were either "appropriated by the Japanese military" or "built by the army," with conditions "regulated" by the Japanese Army Pet. App. 112a, 115a, 120a, 128a, 130a. The complaint alleges that women "were recruited by force, coercion, or deception into sexual slavery for the Japanese military," and were "coerced into joining the war effort." Pet. App. 111a. It also alleges that some were "recruited under the official labor draft, instituted to strengthen the Japanese war effort," and that they were "recorded on military supply lists" and "shipped * * * like military supplies." Pet. App. 117a, 121a, 122a. The complaint further alleges that all these military activities "required the deployment of the vast infrastructure and resources that were at the government's disposal, including soldiers and support personnel [and] weapons." Pet. App. 121a.

District Court Decision. Japan moved to dismiss the complaint on numerous alternative grounds: (1) that Japan was entitled to sovereign immunity; (2) that the complaint presented non-justiciable political questions; (3) that petitioners' claims were barred by the applicable statute of limitations; (4) that petitioners had no private right of action under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350; (5) that the comity of nations doctrine required dismissal; and (6) that the complaint should be dismissed under the doctrine of *forum non conveniens*. In particular, Japan argued that the FSIA's commercial activity exception does not apply retroactively to war reparations claims against

Japan involving events that occurred before 1952, when the United States adhered to the "absolute" theory of sovereign immunity.

The District Court dismissed the complaint. Without deciding whether the FSIA applies retroactively to events that occurred before 1952, the court held that Japan was nevertheless entitled to immunity. Applying the binding-circuit precedent of *Princz*, the court rejected petitioners' argument that Japan had implicitly waived immunity by violating *jus cogens* norms. *See* Pet. App. 30a-31a. The court further held that the commercial activity exception did not apply because the conduct alleged "certainly is not commercial in nature." Pet. App. 36a. Rather, the alleged conduct—which "might be characterized properly as a war crime or crime against humanity"—" 'boils down' to an abuse * * * of Japan's military power," that is " 'peculiarly sovereign in nature.' " Pet. App. 36a-37a (quoting *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 361 (1993)). Such conduct, the court held, is "not typically engaged in by private players in the market," and thus is "not a commercial activity within the meaning of the FSIA." Pet. App. 36a.

The District Court also dismissed the complaint on the alternative ground that petitioners' claims were barred by the political question doctrine. Noting that "the series of treaties signed [by Japan] after the war was clearly aimed at resolving all war claims against Japan," the court held that "[t]here is no question that this court is not the appropriate forum in which plaintiffs may seek to reopen those discussions nearly half a century later." Pet. App. 43a-44a. Rather, petitioners' claims were matters to be addressed solely "at the government-to-government level." Pet. App. 44a.

The United States government, through the Departments of State and Justice, supported Japan's position both in the District Court and on appeal, taking the position that the complaint should be dismissed because Japan was entitled to

sovereign immunity and because the San Francisco Treaty embodies the foreign policy determination of the United States that all claims against Japan arising out of its prosecution of World War II are to be resolved through intergovernmental settlements.

D.C. Circuit Decision. The D.C. Circuit affirmed the dismissal of the complaint. Addressing the question whether the FSIA's commercial activity exception applies retroactively to claims against Japan involving wartime events that occurred before 1952, the court held that it does not. As the court recognized, "[p]rior to 1952, the courts of the United States generally followed the doctrine of 'absolute immunity.' " Pet. App. 5a. It was not until 1952, in the so-called "Tate Letter," that the United States adopted the "restrictive" theory of immunity, under which " 'immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts.' " *Id.* (quoting *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 487 (1983)).

Applying this Court's two-step retroactivity analysis, the D.C. Circuit first considered "whether the commercial activity exception * * * has retroactive effect." Pet. App. 6a. The court answered that question in the affirmative: "application of the commercial activity exception to events that occurred prior to 1952 would impose new obligations upon, come without fair notice to, and upset the settled expectations of, foreign sovereigns." Pet. App. 7a. As the court explained, "the United States clearly changed its position in 1952 when it adopted the doctrine of restrictive immunity." *Id.* "Theretofore a foreign sovereign justifiably would have expected any suit in a court of the United States—whether based upon a public or a commercial act—to be dismissed unless the foreign sovereign consented to the suit." *Id.* Thus, the court held, "because Japan had a settled expectation in the 1930s and 1940s that its commercial activities would not be subject to suit in a court of the United States,

application of the commercial activity exception of the FSIA to acts occurring then would clearly be retroactive in effect." Pet. App. 8a.

In so holding, the D.C. Circuit expressly "recognize[d] the Ninth Circuit [had] recently held [in *Altmann*] that the expropriation exception to the FSIA * * * may be applied retroactively to activities of the German and Austrian governments in the 1930s and 1940s." Pet. App. 10a. The D.C. Circuit held, however, that "[r]egardless whether we would follow the *Altmann* decision, we do not find its reasoning applicable to this case because of the 1951 Treaty of Peace with Japan." *Id.* As the court explained, the Treaty "manifests the parties' intent to resolve matters arising from World War II without involving the courts of the United States (or of any signatory nation)." *Id.* "As a result, Japan could not have expected to be sued in a court of the United States by either an Allied national or a Chinese or Korean national for a claim arising out of World War II because the Allied Powers had respectively waived the claims of their nationals and expressed a clear policy of resolving the claims of other nationals through government-to-government negotiations." Pet. App. 11a. The court held that "[b]ecause there was no similar treaty with Germany or Austria, and therefore no similar settled expectation," the Ninth Circuit's decision in *Altmann* "is not relevant to the present case." *Id.*

The D.C. Circuit further noted that "*Altmann* is not relevant to the present case for a second reason." *Id.* In 1949, the State Department issued the so-called *Bernstein* letter, specifically stating that:

> The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of the Nazi persecution in Germany, is to relieve American courts

> from any restraint upon the exercise of their jurisdiction *to pass upon the validity of the acts of Nazi officials.*[2]

As the D.C. Circuit observed, there does not appear to be "any similar statement of policy regarding the alleged acts of Japan in this case." Pet. App. 12a. Thus, the court concluded, "[t]he lack of such a statement not only distinguishes this case from *Altmann*; it also gives us all the more reason to believe the Executive wanted to handle claims against Japan arising out of World War II solely at the level of intergovernmental negotiations." *Id.*

Turning to the second step in its retroactivity analysis, the court considered "whether the Congress manifested a clear intent to overcome the presumption against retroactive legislation," and held that there is "no clear indication" that Congress intended the FSIA's commercial activity exception "to apply to events occurring before 1952." *Id.* In so holding, the court specifically rejected petitioners' argument that Congress's repeal, concurrent with the passage of the FSIA, of a provision conferring diversity jurisdiction in cases brought by United States citizens against foreign states, *see* 28 U.S.C. § 1332 (1976), suggests that Congress intended the FSIA to apply retroactively. The court held that although that might be true "as applied to events occurring between 1952 and 1976," Congress's repeal of that provision "cannot provide a basis * * * for altering sovereign immunity as it existed prior to 1952." Pet. App. 13a. "The most that can be said is that in enacting the FSIA the Congress intended to incorporate the doctrine of restrictive immunity into federal

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[2] *See* Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to the Attorneys for the Plaintiff in Civil Action No. 31-555 in the U.S. District Court for the Southern District of New York (Apr. 13, 1949) (emphasis added), *reprinted in Bernstein* v. *N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375, 376 (2d Cir. 1954).

law, not that the doctrine be applied to events that occurred before the United States first adopted it." *Id.*

The D.C. Circuit also rejected petitioners' argument that congressional intent to apply the FSIA retroactively can be found in the FSIA's preamble, which states that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in [the Act]." 28 U.S.C. § 1602. That language, the court held, "falls far short" of expressing a "clear intent" to apply the FSIA retroactively. Pet. App. 13a. Instead, "the most probable meaning" of the preamble is that future claims of immunity would be decided by the courts rather than the State Department. *Id.*

Having held that the FSIA's commercial activity exception does not apply retroactively to events that predate the Tate Letter, the D.C. Circuit quickly disposed of petitioners' remaining arguments in support of jurisdiction. The court held that petitioners' claims that Japan had impliedly waived immunity by violating *jus cogens* norms was foreclosed by the court's decision in *Princz*, *supra*, where the court "soundly rejected that argument." Pet. App. 14a. The court concluded that there was no need to revisit *Princz*, particularly given that two other circuits had since followed it. Pet. App. 15a (citing cases).

Finally, the court noted that the parties disputed whether the ATCA creates a cause of action for violations of customary international law. The court held that it "need not reach this question," because "whatever else the [ATCA] might do, it does not provide the courts with jurisdiction over a foreign sovereign." *Id.* Rather, "[o]nly the FSIA can provide such jurisdiction." *Id.* Because petitioners had failed to establish a "jurisdictional predicate under the FSIA," their claims were required to be dismissed. *Id.*

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT WITH THIS COURT'S RETROACTIVITY JURISPRUDENCE.

1. Petitioners' contention that the decision below "cannot be reconciled with this Court's retroactivity jurisprudence" is quite mistaken. Pet. 8. Invoking this Court's decision in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), petitioners argue that, because the FSIA is a jurisdictional statute, it applies "in all cases against foreign sovereigns decided subsequent to its enactment." Pet. 8-9. But as the Court subsequently confirmed in *Hughes Aircraft Co.* v. *United States*, 520 U.S. 939, 951 (1997), "[t]he fact that courts often apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain limited circumstances failing to meet the conditions for our generally applicable presumption against retroactivity." Thus, as the Court held, "[s]tatutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action * * * affect only *where* a suit may be brought, not *whether* it may be brought at all." *Id.* (emphases in original). Such statutes "can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties." *Id.* By contrast, a statute that "does not merely allocate jurisdiction among forums," but rather "*creates* jurisdiction where none previously existed," "speaks not just to the power of a particular court but to the substantive rights of the parties as well." *Id.* (emphasis in original).[3]

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[3] This distinction underlies the D.C. Circuit's decision in *Creighton Ltd.* v. *Qatar*, 181 F.3d 118 (D.C. Cir. 1999), on which petitioners rely. *See* Pet. 10. There, the court held that application of an FSIA amendment that provided for jurisdiction to enforce arbitral awards against a foreign sovereign to events preceding its enactment was not impermissibly retroactive because the amendment did not "affect the contractual rights of the parties to arbitration *but only the tribunal that may hear a dispute concerning the enforcement of an arbitral award.*" *Id.* at 124 (emphasis added).

As the D.C. Circuit held below, "by qualifying what previously had been the absolute immunity of foreign sovereigns," the FSIA's commercial activity exception " 'creates jurisdiction where none previously existed' and therefore affects the substantive rights of the concerned parties." Pet. App. 9a. If the FSIA, which codifies the restrictive theory of immunity, were applied to events occurring before 1952, it would "create[] jurisdiction where none previously existed" because, prior to 1952, courts did not exercise jurisdiction over foreign sovereigns in suits arising out of "strictly commercial acts." *Verlinden*, 461 U.S. at 487. Accordingly, the decision below, far from conflicting with this Court's retroactivity precedents, is entirely in keeping with them.

2. Petitioners' attempts to demonstrate otherwise are unavailing. Petitioners contend, for instance, that "[u]nlike the provision at issue in *Hughes*, the FSIA does not create or eliminate any substantive causes of action." Pet. 11. But as petitioners elsewhere acknowledge, *see id.*, the provision in *Hughes* "eliminate[d] a defense" to suit. 520 U.S. at 948. As the D.C. Circuit held below, in "creat[ing] jurisdiction where none previously existed," that is just what the FSIA does. Pet. App. 9a. That is, by removing immunity for a foreign sovereign's "strictly commercial acts," the FSIA also "eliminates a defense" to suit. As the Court held in *Hughes*, the elimination of a defense to suit "attach[es] a new disability, in respect to transactions or considerations already past." *Id.* at 948 (quotation omitted).[4]

The D.C. Circuit did not find its own decision in *Creighton* controlling in this case, and there is no basis for invoking this Court's review to resolve a purported intra-circuit conflict in any event.

[4] Petitioners argue that the FSIA "merely addresses *which* courts may entertain cases" against foreign sovereigns, asserting that "Japan was amenable to suit for its commercial acts in other courts" prior to 1952. Pet. 11 & 12 n.8 (emphasis in original). Even assuming that Japan could have been sued prior to 1952 in another foreign country for the war crimes alleged here—and

Petitioners' contention that the FSIA "does not alter the substantive rights or obligations of the parties" is equally without merit. Pet. 9. As this Court held in *Hughes*, statutes, like the FSIA, which "create[] jurisdiction where none previously existed," "speak[] not just to the power of a particular court *but to the substantive rights of the parties as well.*" *Id.* at 951 (emphasis added and omitted). Indeed, this Court has made clear that sovereign immunity is a matter of "*substantive* federal law." *Verlinden*, 461 U.S. at 493 (emphasis added). Not surprisingly, the D.C. Circuit is not alone in holding that application of the FSIA's commercial activity exception to events occurring before 1952 would impair the substantive rights of foreign sovereigns. *See Carl Marks & Co.* v. *Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir.) ("retroactive application of the FSIA would affect adversely the USSR's settled expectation, rising to the level of an antecedent right, of immunity from suit in the American courts") (quotation omitted), *cert. denied*, 487 U.S. 1219 (1988); *Jackson* v. *People's Republic of China*, 794 F.2d 1490, 1497-98 (11th Cir. 1986) ("to give the Act retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns").[5]

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petitioners present no evidence to that effect—petitioners' argument fails. As in *Hughes*, the elimination of sovereign immunity as a defense "essentially creates a new cause of action" by subjecting foreign sovereigns to "previously foreclosed" litigation. 520 U.S. at 950. Thus, regardless of whether Japan could have been sued under the laws of another foreign country, retroactive application of the FSIA to events predating 1952 would subject Japan to an entirely new—and different—cause of action here.

[5] Although petitioners contend that "[a]n expectation of immunity is not a substantive right that will prevent retroactive application of a statute," Pet. 9 n.6, none of the cases they cite stand for that proposition. In *Verlinden*, *supra*, for instance, this Court did not say that foreign sovereign immunity can never be a right, but rather only that it is "not a restriction imposed by the Constitu-

Moreover, to the extent petitioners contend that *only* statutes that "alter substantive rights" may have an impermissible retroactive effect, they are mistaken. Indeed, this Court squarely rejected that contention in *Hughes*. There, the Court made clear that Justice Story's "influential" description of impermissible retroactive legislation—including statutes which " 'take[] away or impair[] vested rights acquired under existing laws' "—"does not purport to define the outer limit of impermissible retroactivity." 520 U.S. at 946-947 (quoting *Society for Propagation of the Gospel* v. *Wheeler*, 22 F. Cas. 756, 767 (C.C.N.H. 1814) (Story, J.) (quotation omitted)). Rather, this Court "has used various formulations to describe the 'functional conceptio[n] of legislative "retroactivity." ' " *Id.* at 947 (quoting *Landgraf*, 511 U.S. at 269).

Although there is no "exclusive definition" of impermissible retroactive legislation, *id.*, "familiar considerations of fair notice, reasonable reliance, and settled expectations" offer

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tion." 461 U.S. at 486. Similarly, in *United States* v. *Alabama*, 362 U.S. 602 (1960), the Court did not opine on whether an expectation of immunity can ever rise to the level of a "right" for purposes of retroactivity. Indeed, in that case declaratory and injunctive relief, not damages, were sought; thus, application of the statute at issue did not raise any retroactivity concerns. *See Landgraf*, 511 U.S. at 273 ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.").

Petitioners' reliance on *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983), is also misplaced. *See* Pet. 9. In addressing the argument that the FSIA prohibits holding a foreign instrumentality owned and controlled by a foreign government responsible for actions taken by that government, the Court made clear that "the Act was not intended to affect the substantive law determining the *liability* of a foreign state or instrumentality." 462 U.S. at 620 (emphasis added). If applied retroactively here, however, that is just what the FSIA would do, contrary to the intent of Congress. *See supra* at 12 & n.4.

courts "sound guidance." *Landgraf*, 511 U.S. at 270. As the D.C. Circuit concluded below, before 1952 "a foreign sovereign justifiably would have expected any suit in a court of the United States—whether based upon a public or a commercial act—to be dismissed unless the foreign sovereign consented to the suit." Pet. App. 7a. Thus, the court held, "because Japan had a settled expectation * * * that its commercial activities would not be subject to suit in a court of the United States, application of the commercial activity exception of the FSIA to acts occurring then would clearly be retroactive in effect." Pet. App. 8a. *See also Jackson*, 794 F.2d at 1498 ("It would be manifestly unfair for the United States to modify the immunity afforded a foreign state in 1911 by the enactment of a statute nearly three quarters of a century later.").[6]

The Court's decision in *Verlinden*, *supra*, is not to the contrary. *See* Pet. 10.[7] *Verlinden* involved a foreign sover-

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[6] Petitioners contend that the State Department "would [not] have filed a suggestion of immunity on behalf of the Japanese government during the period from 1931 to 1945" because Japan was a belligerent nation. Pet. 15. Petitioners do not cite—and Japan is not aware of—*any* case in which a non-consenting foreign sovereign was denied immunity before 1952 on that basis. Indeed, even after the adoption of the restrictive theory, foreign sovereigns continued to receive immunity in cases "involving the exercise of the power of the police or military of a foreign state." *Nelson*, 507 U.S. at 362 n.5 (citing examples).

[7] Nor do *National City Bank of New York* v. *Republic of China*, 348 U.S. 356 (1955), and *New York & Cuba Mail S.S. Co.* v. *Republic of Korea*, 132 F. Supp. 684 (S.D.N.Y. 1955), suggest otherwise. *See* Pet. 10-11 n.7. In *National City Bank*, this Court held that China was not immune from suit on a counterclaim because it had "freely come as a suitor into our courts," not because the restrictive theory of immunity applied. 348 U.S. at 364. In *New York & Cuba Mail*, the court held that it lacked jurisdiction over Korea based on the State Department's suggestion that a foreign sovereign's property is immune from attachment

eign's alleged breach of a letter of credit—*i.e.*, a "strictly commercial act[]." 461 U.S. at 487. Since the adoption of the restrictive theory of immunity in 1952, foreign sovereigns have been subject to suit in the United States for such acts. Thus, applying the FSIA's commercial activity exception to a commercial act that occurred just prior to its enactment would not "impose new obligations upon, come without fair notice to, and upset the settled expectations of, foreign sovereigns." Pet. App. 7a. The same is not true with respect to commercial acts that occurred before 1952, when a foreign sovereign "justifiably would have expected any suit in a court of the United States—whether based upon a public or a commercial act—to be dismissed unless the foreign sovereign consented to the suit." *Id.*

II. AS THE D.C. CIRCUIT HELD, THIS CASE IS DISTINGUISHABLE FROM *ALTMANN* IN SEVERAL KEY RESPECTS.

There is likewise no conflict between the decision below and the Ninth Circuit's decision in *Altmann*. The D.C. Circuit expressly distinguished *Altmann*, holding that "[w]e do not find [the Ninth Circuit's] reasoning applicable to this case." Pet. App. 10a. Indeed, even petitioners acknowledge that the two cases involve "related," not identical, issues. Pet. i. As explained below, this case differs from *Altmann* in several key respects.

1. First, as discussed above, the 1951 San Francisco Treaty expressly extinguished "all * * * claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the

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and seizure. 132 F. Supp. at 686-687. As a result, the court did not reach Korea's argument "that it may not be sued in our courts without its consent," as well as its alternative argument that "even under the new policy of the State Department * * * it [was] still entitled to exemption from suit since the [relevant] acts * * * were public and governmental." *Id.* at 686.

war." 136 U.N.T.S. at 64, art. 14(b). As the D.C. Circuit explained, the Treaty "embodies the foreign policy determination of the United States that *all* claims against Japan arising out of its prosecution of World War II are to be resolved through intergovernmental settlements." Pet. App. 10a (emphasis added; quotation omitted). Thus, the retroactive application of the FSIA to claims arising out of any actions taken by Japan during World War II would clearly upset Japan's settled expectations, regardless of how claims against other nations are resolved.

In distinguishing *Altmann*, the D.C. Circuit observed that "there was no similar treaty with Germany or Austria, and therefore no similar settled expectation." *Id.* at 11a. Petitioners note that the United States entered into treaties with Germany and Austria providing for the restitution of certain confiscated property. Pet. 6. Those treaties also embody the Executive Branch's foreign policy determination that Nazi reparation claims are matters to be resolved through government-to-government negotiations, not private litigation, which is one reason the Ninth Circuit was mistaken in *Altmann*. But in any event, unlike the San Francisco Treaty, *none* of those treaties *expressly* waived all claims of the signatories and their nationals for actions taken in the course of the prosecution of the war.

Petitioners also note that China and Korea were not parties to the San Francisco Treaty. Pet. 16. As the D.C. Circuit explained, however, the Treaty "further provides that Japan would resolve the war-related claims of other United Nations member states and their nationals 'on the same or substantially the same terms,' that is, through intergovernmental agreements, *see* art. 26, as in fact it did." Pet. App. 11a. Thus, as the court held, "Japan could not have expected to be sued in a court of the United States by either an Allied national *or a Chinese or Korean national* for a claim arising out of World War II because the Allied Powers had respectively waived the claims of their nationals and expressed a

clear policy of resolving the claims of other nationals through government-to-government negotiations." *Id.* (emphasis added).

Petitioners further contend that "[a]t most, the Treaty could have affected Japan's expectations from September 8, 1951, when it was signed, until May 19, 1952, when the United States adopted the restrictive theory." Pet. 17. Even if that were true, it would not change the fact that Japan had a legitimate expectation at the time it signed the Treaty that it would not be sued in the courts of the United States for any actions taken in the prosecution of the war, including the events alleged here, and that retroactive application of the FSIA would clearly upset that expectation. The Treaty was necessarily negotiated against the backdrop of the absolute immunity principles of the day, and retroactive application of the FSIA more than a half century later would undermine the foundation of a landmark agreement that is integral to this Nation's security and diplomatic relationships in the Asia-Pacific region and the entire world.

Thus, for these reasons (among others), the D.C. Circuit's decision would have to stand regardless of how this Court resolves *Altmann*. As the D.C. Circuit concluded, the San Francisco Treaty—which is the supreme law of the land as much as any statute—provides an independent basis for dismissal. In these circumstances, no purpose would be served by prolonging this litigation any further.

2. Second, *Altmann* involves the FSIA's expropriation exception, whereas this case involves the commercial activity exception. The Ninth Circuit held that the expropriation exception applied retroactively in *Altmann* in part because—in its view—the so-called *Bernstein* letter announced a policy to strip Austria of immunity for Nazi expropriations of private property. *See Altmann*, 317 F.3d at 965-966. Although Japan believes that the Ninth Circuit's reliance on the

Bernstein letter was erroneous,[8] as the D.C. Circuit concluded below, there is no "similar statement of policy regarding the alleged acts of Japan." Pet. App. 12a. Petitioners contend that the D.C. Circuit was mistaken, but do not identify a single specific statement announcing a similar policy. Instead, they vaguely refer to a "a series of declarations * * * directed at all enemy nations." Pet. 7. Petitioners also cite a State Department bulletin "condemn[ing]" Japan's World War II conduct. *Id.* But expressions of moral outrage simply do not translate into a foreign policy determination to abrogate sovereign immunity.

3. Third, the Ninth Circuit relied in part on the fact that "Austria itself had adopted the restrictive theory" prior to 1952. *See Altmann*, 317 F.3d at 966. The Ninth Circuit erred in relying on foreign law, which has never been relevant in determining whether a foreign sovereign is entitled to immunity in *this* country. Nevertheless, the same document that establishes that Austria had adopted the restrictive theory before 1952—the Tate Letter—also makes clear that by that time Japan had not. *See* Letter from Jack B. Tate, Acting Legal Advisor, to Acting Attorney General Philip V. Perlman (May 19, 1952), *reprinted in* 26 Dep't State Bull. 984 (1952). Thus, to the extent the retroactivity of the FSIA's immunity exceptions turns on whether a nation had adopted the restrictive theory before 1952, that factor requires non-retroactivity with regard to Japan.

4. Because the decision below is distinguishable from the Ninth Circuit's decision in *Altmann* in numerous respects, the conflict posited by petitioners is illusory. Accordingly, *Altmann* provides no basis upon which to grant certiorari. Nor is there any reason to hold this case pending this Court's

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[8] The *Bernstein* letter concerned the act of state doctrine, not the doctrine of foreign sovereign immunity. *See Bernstein*, 210 F.2d at 375. The two are distinct doctrines. *See Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401, 438 (1964).

decision in *Altmann*. Even if the Court were to affirm the Ninth Circuit's ruling in *Altmann*—although it should not—that would not undermine the D.C. Circuit's judgment in this case.

Moreover, numerous alternative grounds exist on which to affirm dismissal of petitioners' complaint. As the District Court held, even if the FSIA applies retroactively, the commercial activity exception does not apply in this case because the conduct alleged "certainly is not commercial in nature." Pet. App. 36a. As the District Court also held, the complaint is barred by the political question doctrine, because petitioners' claims are matters to be addressed solely "at the government-to-government level." Pet. App. 44a. As noted, the D.C. Circuit accepted this argument as a predicate to its holding on sovereign immunity. In addition to the grounds on which the District Court ruled, Japan asserted several other grounds for dismissal: (1) that petitioners' claims are barred by the applicable statute of limitations; (2) that petitioners have no private right of action under the ATCA; (3) that the comity of nations doctrine requires dismissal; and (4) that the complaint should be dismissed under the doctrine of *forum non conveniens*. Because the judgment below may be sustained on *any* of these grounds, there is no need for the Court to delay the final disposition of this case. In short, regardless of how the immunity issue is resolved, there would be no basis for a U.S. court to entertain claims brought by foreign nationals against a foreign nation for wartime military actions that occurred in Asia more than a half century ago.

III. THERE IS NO *JUS COGENS* EXCEPTION TO SOVEREIGN IMMUNITY.

Petitioners also ask this Court to grant certiorari in this case to decide whether foreign sovereigns are entitled to immunity from suits "based on their wartime acts." Pet. 17. Although petitioners avoid framing the question as such, petitioners are

essentially asking this Court to decide whether there is a *jus cogens* exception to sovereign immunity. Petitioners thus neglect to mention that *every* circuit court to consider the issue has squarely held that the violation of *jus cogens* norms does *not* constitute a waiver of immunity under the FSIA. *See* Pet. App. 14a-15a; *Sampson* v. *Federal Republic of Germany*, 250 F.3d 1145, 1156 (7th Cir. 2001); *Smith* v. *Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 245 (2d Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997); *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 718-719 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993). Petitioners cite former Judge Wald's dissent in *Princz*, but a conflict within a particular panel is not one of this Court's criteria for certiorari. *See* S. Ct. Rule 10.

Petitioners attempt to frame the inquiry as whether, "*even if the FSIA does not apply* to cases arising from Japan's actions * * *, sovereign immunity should still be denied." Pet. 15-16 (emphasis added). But that is just another way of arguing that there is a *jus cogens* exception to immunity under the FSIA. As this Court has recognized, the FSIA "provides the *sole* basis for obtaining jurisdiction over a foreign state." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989) (emphasis added). Under the U.S. legal system, it is thus up to Congress, not the courts, to create new exceptions to immunity. *See* Pet. App. 14a ("the fundamental premise of [*Princz*]—that a court cannot create a new exception to the general rule of immunity under the guise of an 'implied waiver'—remains sound"); *Princz*, 26 F.3d at 1174 n.1; *Sampson*, 250 F.3d at 1154-55; *cf. Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945) ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."). Petitioners' invitation to usurp Congress's authority should be declined.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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